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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Chad Everett Braxton,

10 Petitioner,

11 v.

12 State of Arizona, et al.,

13 Respondents.
14

No. CV-13-01916-PHX-JJT (BSB)

**REPORT AND
RECOMMENDATION**

15 On September 16, 2013, Petitioner Chad Everett Braxton filed a Petition for Writ
16 of Habeas Corpus, pursuant to 28 U.S.C. § 2254. (Doc. 1.) The Court dismissed the
17 petition with leave to file an amended petition on the court-approved form. (Doc. 5.) On
18 December 9, 2013, Petitioner filed an amended petition. (Doc. 8.) On February 12,
19 2014, the Court dismissed the amended petition for failure to allege a violation of a
20 particular federal right, but granted Petitioner leave to file a second amended petition
21 within thirty days of the Court's order. (Doc. 10.) On March 28, 2014, the Court
22 dismissed this matter without prejudice based on Petitioner's failure to file a second
23 amended petition. (Doc. 11.)

24 On May 22, 2014, Petitioner filed several documents explaining that he was
25 unable to comply with the February 12, 2014 Order because he had been transferred to a
26 new location and his legal files were lost. (Doc. 14.) On June 10, 2014, the Court
27 construed the filing as a motion to re-open the case, granted the motion, and directed
28 Petitioner to file a second amended petition within thirty days. (Doc. 15.) After

1 receiving an extension of time, on October 10, 2014, Petitioner filed the pending Second
2 Amended Petition raising four grounds for relief. (Doc. 22.) The Court directed
3 Respondents to file an answer and stated that they could file an answer limited to
4 affirmative defenses, including procedural bar. (Doc. 24 at 5.) Respondents filed a
5 limited answer to the Second Amended Petition arguing that Petitioner's claims are
6 procedurally barred from federal habeas corpus review. (Doc. 30.) Petitioner has filed a
7 reply in support of his Petition.¹ (Doc. 31.) For the reasons below, the Court
8 recommends the Petition be denied.

9 **I. Procedural Background**

10 **A. Charges, Trial, and Sentencing**

11 On July 20, 2010, Plaintiff was indicted in the Maricopa County Superior Court on
12 one count of trafficking in stolen property in the second degree, a class three felony.
13 (Doc. 30, Ex. A.) The State alleged that Petitioner participated in the sale of a stolen van.
14 (*Id.* at 3.) The State also alleged several aggravating circumstances and that Petitioner
15 had a prior felony conviction. (Doc. 30, Exs. B, C.) Petitioner initially represented
16 himself, but before trial allowed his advisory counsel to defend him. (Doc. 30, Ex. D.)
17 Before trial, the State filed a motion to preclude the testimony of the defense's expert on
18 video enhancement. (Doc. 30, Ex. E.) Following a hearing, the trial court found that the
19 expert could testify about the video enhancement and show his work to the jury, but that
20 he could not give his opinion about whether Petitioner was the individual in the
21 surveillance video recording. (Doc. 30, Ex. EE at 34-35.)

22 On the second day of Petitioner's jury trial, the State disclosed that one of the
23 detectives would testify that he had prior contact with Petitioner when he was engaged in
24 non-criminal conduct. (Doc. 30, Ex. I, Ex. FF at 3-4.) Petitioner's counsel objected to
25 the testimony based on Rule 404(b) of the Arizona Rules of Evidence, and lack of prior
26 disclosure. (Doc. 30, Ex. FF. at 4.) The trial court ruled that the detective could not

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28 ¹ In his reply, Petitioner requests the appointment of counsel. (Doc. 31 at 1.) The
Court addressed this request in separate order and does not revisit that issue. (Doc. 32.)

1 testify about his prior contact with Petitioner, unless Petitioner opened the door during
2 cross-examination by challenging the certainty of the detective's identification of him.
3 (Doc. 30, Ex. FF at 4, 7-8.) After Petitioner's counsel asked the detective if he was
4 certain that Petitioner was the individual who participated in the sale of the stolen van,
5 the trial court ruled that the defense had opened the door to the detective's testimony
6 about his previous encounter with Petitioner. (*Id.* at 144.) However, to avoid the
7 detective testifying about his prior contact with Petitioner, the parties stipulated that the
8 detective had prior contact with Petitioner in a non-criminal context. (*Id.* at 161-62.)

9 The jury found Petitioner guilty as charged. (Doc. 30, Exs. K, L, HH.) Petitioner
10 filed a motion for a new trial based on the trial court's ruling that lead to the stipulation
11 about the detective's prior encounter with Petitioner. (Doc. 30, Exs. M-P, JJ.) The court
12 denied the motion for a new trial. (*Id.*) On November 29, 2011, the court held a trial on
13 Petitioner's prior felony conviction. (Doc. 30, Exs. O, II.) On January 26, 2012, the trial
14 court sentenced Petitioner to a mitigated term of five years' imprisonment with 273 days
15 of presentence incarceration credit. (Doc. 30, Exs. Q, KK.)

16 **B. Direct Appeal**

17 On January 27, 2012, Petitioner filed a notice of appeal in the Arizona Court of
18 Appeals. (Doc. 30, Ex. R.) Petitioner's trial counsel withdrew, and the court appointed
19 appellate counsel. (Doc. 30, Ex. S.) Petitioner's appellate counsel filed a brief pursuant
20 to *Anders v. California*, 386 U.S. 738 (1967), stating that she could find no issue to
21 present on appeal and requesting that the court allow Petitioner to file a supplemental
22 brief. (Doc. 30, Ex. U.) The court granted counsel's request and allowed Petitioner to
23 file a supplemental brief. (Doc. 30, Ex. V.) Petitioner did not file a supplemental brief.
24 Therefore, the court reviewed the record for fundamental error. (Doc. 30, Ex. W.) On
25 January 10, 2013, the court of appeals issued a memorandum decision finding no
26 reversible error and affirming Petitioner's conviction and sentence. (*Id.*)

27 On January 31, 2013, Petitioner filed a motion for reconsideration, explaining that
28 he mistakenly sent his supplemental brief to the capital litigation/criminal appeals section

1 of the Attorney General's Office. (Doc. 30, Ex. X.) On March 7, 2013, the court of
 2 appeals summarily denied the motion. (Doc. 30, Ex. Y.) On April 1, 2013, Petitioner
 3 filed a petition for review to the Arizona Supreme Court. (Doc. 30, Exs. Z, AA.)
 4 Petitioner argued that the court should reverse the appellate court's denial of his motion
 5 for reconsideration because his failure to properly file his supplemental appellate brief
 6 was inadvertent and caused by his lack of legal knowledge. (Doc. 30, Ex. X.) On August
 7 20, 2013, the Arizona Supreme Court denied review. (Doc. 30, Ex. BB.)

8 **C. Federal Petition for Writ of Habeas Corpus and the Answer**

9 On October 10, 2014, Petitioner filed his Second Amended Petition for Writ of
 10 Habeas Corpus in this Court. (Doc. 22.) Petitioner raises the following claims: (1) his
 11 Sixth Amendment right to the effective assistance of counsel was violated when trial
 12 counsel agreed to stipulate to the detective's prior identification of Petitioner, over his
 13 objection to the stipulation (Ground One); (2) the trial court violated his Fifth and
 14 Fourteenth Amendment due process rights by admitting evidence of the detective's prior
 15 identification of Petitioner (Ground Two); (3) the trial court violated his Fifth, Sixth, and
 16 Fourteenth Amendment rights when it limited the scope of his forensic expert's testimony
 17 (Ground Three); and (4) his conviction is unconstitutional because no physical evidence
 18 linked him to the crime, the police lacked probable cause for his arrest, and the police
 19 used a photo array that was suggestive in violation of his due process rights (Ground
 20 Four). (Doc. 22 at 6-18.)

21 Respondents filed a limited answer asserting that federal habeas corpus review of
 22 Petitioner's claims is procedurally barred. (Doc. 30.) Respondents filed several exhibits
 23 to support their answer. (Doc. 16, Exs. A-LL.) In his reply, Petitioner argues that the
 24 answer does not comply with Rule 5(c) of the Rules Governing Section 2254 Cases
 25 because Respondents did not submit certain portions of the state court record.² (Doc. 31
 26 at 5-6.) The Court's December 3, 2014 Order specifically permitted Respondents to file

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 28 ² Rule 5(c) provides that the answer must indicate what transcripts are available
 and that "respondent must attach to the answer parts of the transcript that the respondent
 considers relevant."

1 an answer limited to affirmative defenses, including procedural bar. (Doc. 24.) As
 2 allowed by the Court's order, Respondents filed a limited answer arguing that federal
 3 habeas corpus review of Petitioner's claims is procedurally barred. (Doc. 30.)
 4 Respondents' answer complies with Rule 5(c) because Respondents identified the
 5 available transcripts, and submitted the portions of the record that are relevant to their
 6 answer. (Doc. 30 at 3, Exs. A-LL.) Accordingly, the Court will consider the briefing on
 7 the Second Amended Petition.

8 **II. Exhaustion and Procedural Bar**

9 Ordinarily, a federal court may not grant a petition for writ of habeas corpus
 10 unless the petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b). To
 11 exhaust state remedies, a petitioner must afford the state courts the opportunity to rule
 12 upon the merits of his federal claims by "fairly presenting" them to the state's "highest"
 13 court in a procedurally appropriate manner.³ *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)
 14 ("[t]o provide the State with the necessary 'opportunity,' the prisoner must 'fairly
 15 present' his claim in each appropriate state court . . . thereby alerting that court to the
 16 federal nature of the claim"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (same).

17 A claim has been fairly presented if the petitioner has described both the operative
 18 facts and the federal legal theory on which his claim is based. *See Baldwin*, 541 U.S. at
 19 33. A "state prisoner does not 'fairly present' a claim to a state court if that court must
 20 read beyond a petition or brief . . . that does not alert it to the presence of a federal claim
 21 in order to find material, such as a lower court opinion in the case, that does so." *Id.* at
 22 31-32. Thus, "a petitioner fairly and fully presents a claim to the state court for purposes
 23 of satisfying the exhaustion requirement if he presents the claim: (1) to the proper
 24 forum . . . (2) through the proper vehicle, . . . and (3) by providing the proper factual and
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 27 ³ In Arizona, unless a prisoner has been sentenced to death, the "highest court"
 28 requirement is satisfied if the petitioner has presented his federal claim to the Arizona
 Court of Appeals either through the direct appeal process or post-conviction proceedings.
Crowell v. Knowles, 483 F. Supp. 2d 925, 931-33 (D. Ariz. 2007) (discussing *Swoopes v.*
Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999)).

1 legal basis for the claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005)
2 (internal citations omitted).

3 The requirement that a petitioner exhaust available state court remedies promotes
4 comity by ensuring that the state courts have the first opportunity to address alleged
5 violations of a state prisoner’s federal rights. *See Duncan v. Walker*, 533 U.S. 167, 178
6 (2001); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Principles of comity also
7 require federal courts to respect state procedural bars to review of a habeas petitioner’s
8 claims. *See Coleman*, 501 at 731-32. Pursuant to these principles, a habeas petitioner’s
9 claims may be precluded from federal review in two situations.

10 First, a claim may be procedurally defaulted and barred from federal habeas
11 corpus review when a petitioner failed to present his federal claims to the state court, but
12 returning to state court would be “futile” because the state court’s procedural rules, such
13 as waiver or preclusion, would bar consideration of the previously unraised claims. *See*
14 *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th
15 Cir. 2002). If no state remedies are currently available, a claim is technically exhausted,
16 but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1.

17 Second, a claim may be procedurally barred when a petitioner raised a claim in
18 state court, but the state court found the claim barred on state procedural grounds. *See*
19 *Beard v. Kindler*, 558 U.S. 53 (2009). “[A] habeas petitioner who has failed to meet the
20 State’s procedural requirements for presenting his federal claim has deprived the state
21 courts of an opportunity to address those claims in the first instance.” *Coleman*, 501 U.S.
22 at 731-32. In this situation, federal habeas corpus review is precluded if the state court
23 opinion relies “on a state-law ground that is both ‘independent’ of the merits of the
24 federal claim and an ‘adequate’ basis for the court’s decision.” *Harris v. Reed*, 489 U.S.
25 255, 260 (1989).

26 A state procedural ruling is “independent” if the application of the bar does not
27 depend on an antecedent ruling on the merits of the federal claim. *See Stewart v. Smith*,
28 536 U.S. 856, 860 (2002); *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). A state court’s

1 application of the procedural bar is “adequate” if it is “strictly or regularly followed.”
2 *See Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). If the state court occasionally
3 excuses non-compliance with a procedural rule, that does not render its procedural bar
4 inadequate. *See Dugger v. Adams*, 489 U.S. 401, 410-12 n.6 (1989). “The independent
5 and adequate state ground doctrine ensures that the States’ interest in correcting their own
6 mistakes is respected in all federal habeas cases.” *Coleman*, 501 U.S. at 732. Although a
7 procedurally barred claim has been exhausted, as a matter of comity, the federal court
8 will decline to consider the merits of that claim. *See id.* at 729-32.

9 However, because the doctrine of procedural default is based on comity, not
10 jurisdiction, federal courts retain the power to consider the merits of procedurally
11 defaulted claims. *See Reed v. Ross*, 468 U.S. 1, 9 (1984). Generally, a federal court will
12 not review the merits of a procedurally defaulted claim unless a petitioner demonstrates
13 “cause” for the failure to properly exhaust the claim in state court and “prejudice” from
14 the alleged constitutional violation, or shows that a “fundamental miscarriage of justice”
15 would result if the claim were not heard on the merits. *Coleman*, 501 U.S. at 750.
16 Additionally, pursuant to 28 U.S.C. § 2254(b)(2), the court may dismiss plainly meritless
17 claims regardless of whether the claim was properly exhausted in state court. *See Rhines*
18 *v. Weber*, 544 U.S. 269, 277 (2005) (holding that a stay is inappropriate in federal court
19 to allow claims to be raised in state court if they are subject to dismissal under
20 § 2254(b)(2) as “plainly meritless”).

21 **III. Petitioner’s Claims**

22 Respondents argue that Petitioner’s claims are procedurally barred from federal
23 habeas corpus review. Petitioner disputes this assertion. As discussed below, the Court
24 concludes that habeas corpus review of Petitioner’s claims is procedurally barred.

25 **A. Petitioner’s Claims are Procedurally Defaulted**

26 Petitioner did not present any of the claims asserted in his Second Amended
27 Petition to the Arizona Court of Appeals on direct review or in a post-conviction
28 proceeding. (Doc. 30, Exs. U, W; Doc. 22 at 3-4, 6, 14.) Accordingly, Petitioner did not

properly exhaust Grounds One, Two, Three, or Four. *See Teague*, 489 U.S. at 297-99; *Coleman*, 501 U.S. at 735 n.1 (stating that “if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is a procedural default for purposes of federal habeas.”).

It would be futile for Petitioner to return to the state courts to try to exhaust these claims. Any attempt to present these claims to the court of appeals would be barred because a petition for appellate review would be untimely and successive. *See Ariz. R. Crim. P. 31.1, 31.3, and 32.2(a)*. Petitioner is also time-barred from a filing a petition for post-conviction relief under Rule 32. *See Ariz. R. Crim. P. 32.4(a); McKinney v. Ryan*, 730 F.3d 903, 913 n.6 (9th Cir. 2013) (finding claims procedurally defaulted because petitioner was barred from exhausting his claims in the first instance by Rules 32.2(a)(3) and 32.4(a)).

Additionally, Petitioner’s claims do not implicate any exceptions to the timeliness rules referred to in Rule 32.4(a) and Rule 32.2(b), including being held in custody after the imposed sentence expired, the presentation of newly discovered material facts that probably would have changed the verdict or sentence, the failure to file a timely notice of post-conviction relief or a notice of appeal that was not the defendant’s fault, a change in the law, or the petitioner’s actual innocence. *See Rule 32.1(d), (e), (f), (g) and (h)*. Accordingly, federal habeas corpus review of Petitioner’s claims is procedurally barred.⁴

⁴ In his reply, Petitioner generally asserts that the “state ground” was not firmly and regularly established. (Doc. 31 at 14.) Thus, it appears Petitioner is suggesting that his claims are not procedurally barred because the state procedural rules that would preclude review are not “adequate.” This argument fails, however, because Petitioner’s claims are not barred because the state court applied a state procedural rule to deny review of his claims. Instead, Petitioner’s claims are procedurally defaulted because Petitioner did not raise his claims to the Arizona Court of Appeals and it would be futile for him to return to state court to try to exhaust his claims due to state procedural rules. *See Teague*, 489 U.S. at 297-99. Under these circumstances, the Court does not consider whether state procedural rules are adequate and independent. Nonetheless, Arizona’s procedural rules are consistently and regularly applied. *See, e.g., Simmons v. Schriro*, 187 Fed. App’x. 753, 754 (9th Cir. 2006) (holding that Arizona’s procedural rules, including its timeliness rules, are “clear” and “well-established”); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (rejecting assertion that Arizona courts’ application of procedural default rules had been “unpredictable and irregular”).

B. Petitioner has not Established a Basis to Overcome the Procedural Bar

Because Petitioner's claims are procedurally defaulted, federal habeas corpus review is unavailable unless Petitioner establishes "cause and prejudice" or a "fundamental miscarriage of justice" to overcome the procedural bar. *See Coleman*, 501 U.S. at 749. For the reasons below, the Court finds that Petitioner has not established a basis to overcome the procedural bar.

1. Cause and Prejudice

A federal court may review the merits of a procedurally defaulted claim if a petitioner establishes "cause" and "prejudice." *Coleman*, 501 U.S. at 750. To establish "cause," a petitioner must establish that some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. *Teague*, 489 U.S. at 298. A showing of "interference by officials," constitutionally ineffective assistance of counsel, or "that the factual or legal basis for a claim was not reasonably available" may constitute cause. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

"Prejudice" is actual harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice, a habeas petitioner bears the burden of demonstrating that the alleged constitutional violation "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *see also Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991) (same). If petitioner fails to establish cause for his procedural default, then the court need not consider whether petitioner has shown actual prejudice resulting from the alleged constitutional violations. *Smith v. Murray*, 477 U.S. 527, 533 (1986).

To establish cause, Petitioner argues that during direct review proceedings he sent his supplemental brief to the "capital litigation/criminal appeals" section of the Arizona Attorney General's Office "thinking that was the court of appeals." (Doc. 31 at 13; Doc. 22 at 2, 14 ("I sent [the supplemental] brief to the capital litigation/criminal appeals section by mistake.")) Petitioner complains that his supplemental brief was not

1 forwarded to the court of appeals. (*Id.*) Petitioner’s own mistake about the appellate
2 court’s mailing address does not constitute cause for his failure to properly exhaust his
3 claims. *See Gutierrez v. California*, 411 Fed. App’x 952, 953 (9th Cir. 2011)
4 (petitioner’s confusion about proper address of state court of appeals was not an
5 extraordinary circumstance, “but rather a ‘garden variety claim of excusable neglect’ that
6 ‘does not warrant equitable tolling’”) (quoting *Holland v. Florida*, 560 U.S. 631, 652
7 (2010)); *Payne v. Miner*, 2011 WL 3607276, at *2 (E.D.N.C. Aug. 16, 2011) (mail
8 returned for insufficient postage and for not having the proper address did not constitute
9 cause to for failure to exhaust administrative remedies).

10 Petitioner also suggests that the Arizona Attorney General’s Office’s failure to
11 forward his supplemental brief to the appellate court constitutes cause. (Doc. 31 at 13.)
12 Petitioner mailed his supplemental brief to the attorney general’s office instead of the
13 court of appeals. Petitioner’s own mistake resulted in his brief not being filed in the
14 appellate court. The attorney general’s office did not impede Petitioner’s efforts to
15 comply with the deadline for filing his supplemental brief. *See Teague*, 489 U.S. at 298
16 (to establish “cause,” a petitioner must establish that some objective factor external to the
17 defense impeded his efforts to comply with the state’s procedural rules).

18 Petitioner further argues that after the appellate court affirmed his conviction and
19 sentence, he filed a motion for reconsideration along with his supplemental brief asking
20 the court to consider his supplemental brief. (Doc. 31 at 13.) The appellate court denied
21 that motion. Petitioner filed a petition for review in the Arizona Supreme Court “asking
22 [the court] to make the Court of Appeals accept his appeal or take responsibility”
23 (*Id.*) The Arizona Supreme Court denied Petitioner’s motion. Petitioner suggests that
24 these state court rulings constitute cause for his failure to exhaust his claims. The record
25 does not support this assertion. The appellate court reviewed the record for fundamental
26 error and affirmed Petitioner’s conviction and sentence. The court did not consider the
27 claims presented in Petitioner’s supplemental brief because he did not present it to the
28 court until after it dismissed his appeal. Thus, as a result of Petitioner’s failure to comply

1 with the appellate court's order that he file a supplemental brief, the claims Petitioner
 2 raises in his Second Amended Petition were not considered on direct review by the
 3 appellate court. There is no evidence that the Arizona Court of Appeals or the Arizona
 4 Supreme Court impeded Petitioner's ability to file a supplemental brief in the appellate
 5 court or impeded Petitioner's ability to seek review of his claims in a Rule 32 proceeding.

6 To establish cause for the procedural default of Ground One (ineffective assistance
 7 of trial counsel), Petitioner argues that he thought he had to raise his claim of ineffective
 8 assistance of trial counsel in a Rule 32 proceeding after the conclusion of his direct
 9 appeal. (Doc. 22 at 6.) Petitioner is correct that, in Arizona, claims of ineffective
 10 assistance of trial counsel are properly raised in a petition for post-conviction under Rule
 11 32. *See* Ariz. R. Crim. P. 32.1(a); *Bradley v. Ryan*, 2014 WL 4354836, at *19 (D. Ariz.
 12 Sept. 3, 2014) ("In Arizona, the state collateral proceeding is the initial review
 13 proceeding for claims of ineffective assistance of trial and appellate counsel."). Thus,
 14 Petitioner could have exhausted his claim of ineffective assistance of trial counsel by
 15 raising that issue in a post-conviction proceeding under Rule 32. Petitioner does not
 16 provide a specific explanation for his failure to file a petition for post-conviction review,
 17 despite knowing that he should present claims of ineffective assistance of trial counsel in
 18 a Rule 32 proceeding.⁵ (Doc. 22 at 6.)

19 To establish cause for the procedural default of Grounds One, Two, Three, and
 20 Four, Petitioner asserts that appellate counsel "left him to represent himself," he lacked

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 22 ⁵ Petitioner does not claim he can establish cause for failure to exhaust his claim
 23 of ineffective assistance of trial counsel based on *Martinez v. Ryan*, ___ U.S. ___, 132
 24 S. Ct. 1309 (2012) (Docs. 22, 31.) Additionally, Petitioner did not file a notice of post-
 25 conviction relief and, therefore, he cannot rely on *Martinez* to establish cause for his
 26 failure to present his ineffective assistance of trial counsel claim to the state courts. *See*
 27 *Castillo v. Ryan*, 2013 WL 3282547 at *5 (D. Ariz. Jun. 28, 2013) (noting that
 28 "[Petitioner] . . . never filed notice of an 'of right' Rule 32 proceeding. Accordingly, he
 never had an 'of right' Rule 32 attorney, and now there is no one to shoulder the blame
 for his default. [Petitioner] cannot show cause to excuse the default of [these claims]");
see also Anderson v. Koster, 2012 WL 1898781 at *9 (W.D. Mo. 2012) ("*Martinez* is
 inapposite because, here, the petitioner himself is at fault for not filing a pro se Rule
 29.15 motion in the first place.").

1 access to a law library, and his “whole appeal process was done by jail house lawyers”
2 and he thought that “when they said the court erred, that covered it all.” (Doc. 22 at 6,
3 14.) The record reflects that appellate counsel filed an *Anders* brief on direct appeal and
4 obtained permission from the court for Petitioner to file a supplemental brief. (Doc. 30,
5 Exs. U, V.) The record does not support Petitioner’s assertion that appellate counsel
6 abandoned him or that she somehow impeded his ability to file a supplemental brief on
7 direct review or a petition for post-conviction relief. Accordingly, Petitioner has not
8 shown that appellate counsel’s actions constitute cause for his failure to exhaust his
9 claims.

10 Additionally, Petitioner’s status as an inmate, lack of legal knowledge, and limited
11 legal resources do not establish cause to excuse the procedural bar to review of his
12 claims. *See Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (an
13 illiterate pro se petitioner’s lack of legal assistance did not amount to cause to excuse a
14 procedural default); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988) (petitioner’s
15 reliance upon jailhouse lawyers did not constitute cause). Therefore, Petitioner has not
16 shown cause for the procedural default of his claims and the Court does not consider
17 whether Petitioner has shown prejudice. *See Smith v. Murray*, 477 U.S. 527, 533 (1986).

18 **2. Fundamental Miscarriage of Justice**

19 In addition, a federal court may review the merits of a procedurally defaulted
20 claim if the petitioner demonstrates that failure to consider the merits of that claim will
21 result in a “fundamental miscarriage of justice.” *Schlup v. Delo*, 513 U.S. 298, 327
22 (1995). A “fundamental miscarriage of justice” occurs when ““a constitutional violation
23 has probably resulted in the conviction of one who is actually innocent.”” *Id.* (citing
24 *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

25 To establish a fundamental miscarriage of justice, a petitioner must present “new
26 reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness
27 accounts, or critical physical evidence — that was not presented at trial.” *Schlup*, 513
28 U.S. at 324. The petitioner has the burden of demonstrating that “it is more likely than

not that no reasonable juror would have convicted him in light of the new evidence.” *Id.* at 327. Petitioner generally argues that failure to consider his claims will result in a fundamental miscarriage of justice. (Doc. 31 at 14-15.) However, Petitioner has not presented new evidence and has not shown that failure to consider his procedurally defaulted claims will result in a fundamental miscarriage of justice. Thus, he has not met *Schlup*’s high standard and this exception does not excuse the procedural bar.

IV. Conclusion

As set forth above, the Court concludes that Petitioner’s claims asserted in Grounds One, Two, Three, and Four of the Second Amended Petition (Doc. 22) are procedurally barred from federal habeas corpus review and Petitioner has not established a basis to overcome that bar. Accordingly, the Court recommends that the Petition be denied.

Accordingly,

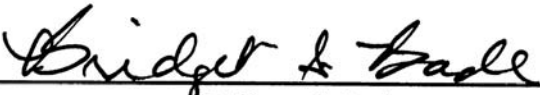
IT IS RECOMMENDED that the Second Amended Petition for Writ of Habeas Corpus (Doc. 22) be **DENIED**.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed in forma pauperis on appeal be **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1), should not be filed until entry of the District Court’s judgment. The parties have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6 and 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge’s Report and Recommendation may result in the District Court’s acceptance of the Report and Recommendation without further review. *See United States*

1 v. *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to
2 any factual determination of the Magistrate Judge may be considered a waiver of a
3 party's right to appellate review of the findings of fact in an order or judgment entered
4 pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

5 Dated this 3rd day of June, 2015.

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10 Bridget S. Bade
11 United States Magistrate Judge
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